

# **Part 201 Liability/Compliance Workgroup Meeting No. 6 – Summary**

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*February 21, 2007, 9:30 AM–12:45 p.m.*

*Public Sector Consultants*

*Lansing, Michigan*

## Workgroup Attendees

Steve Cunningham, RRD-Cadillac District Office

Charles Denton, Varnum & Riddering

Doug McDowell, McDowell & Associates

Pat McKay, RRD-Compliance and Enforcement Section

Richard Plewa, Comerica Bank

Mary Jane Rhoades, Rhoades McKee

Jeanne Schlaufman, RRD-Southeast Michigan District Office

## Observers

Rhonda Klann, RRD

Patricia Thornton, RRD

A.J. Birkbeck, American Brownfields Assurance Co.

Gary Klepper, Conestoga-Rovers & Associates

## Staff

Mark Coscarelli, Public Sector Consultants

Shivaugn Rayl, Public Sector Consultants

## **WELCOME**

The meeting began promptly at 9:30 am. Mark Coscarelli welcomed workgroup participants.

## **AGENDA**

The agenda for the meeting was approved.

## **PREVIOUS MEETING SUMMARY**

The meeting summary from the January 9, 2007 Liability-Compliance work group meeting was approved following the insertion of language on page 2, paragraph 4, that clarifies presumptive liability for holders in the chain of title to apply only to owners/operators pre 1996 statutory changes and the BEA process that afforded liability protection.

## **PERMIT MODEL DISCUSSION SUMMARY**

The group further discussed how a permit approach, in limited cases, might be useful. Moreover, the group has developed a set of recommendations that endorse replacing the

BEA process with submission of and adherence to a due care plan in order to offer non-liable owners and operators liability protection. The due care plan would be submitted to the MDEQ for review and approval, and would be reviewed on a periodic basis for adequacy.

The wholesale adoption of a permit scheme has not been fully explored by this or other work groups. The Liability/Compliance work group recommends a more in-depth examination of the concept.

## **DUE CARE REQUIREMENTS**

The work group returned to a discussion about due care plan recommendations. The following questions were raised:

- Will due care plans be reviewed by MDEQ for sufficiency or simply disclosed to MDEQ?
- Where a party seeks MDEQ review and approval will the due care plan standard for adequacy be achievable?
- What are the timing implications of due care plan review?
- Can a due care plan be dynamic and refer to successive stages of development on a currently vacant site?
- What role will general approval by rule play in the review of due care plans?
- Will due care responsibilities apply to sites that have been contaminated by migrating substances from off-site and have been notified of the contamination?
- Will due care plans be assignable? If so, how will they disclose new sites to the MDEQ?
- Should higher due care obligations be required of those sites that would now be subject to Category S BEA? What alternatives exist? (i.e. release reporting, hazardous substance certification, or concentration monitoring). There is tension between the need to provide liability protection to new owner/operators to encourage site reuse and the need to gather sufficient data to show if contamination is ongoing. Some suggestions included substituting the expectation of distinguishing old from new contamination with the obligation to act with due care and prevent any additional offsite migration.

## **DILIGENT PURSUIT**

A subgroup formed to define diligent pursuit reported to the group. The subgroup suggested that the obligations under section 14 for diligent pursuit of response activities should not be changed. However, they suggested that a reporting requirement should be added to the section. The reporting requirement would set timeframes (45 days to 1 year) within which certain deliverables were due to the MDEQ. Compliance with the diligently pursue requirement would be determined by timely submittal of a deliverable. These deliverables would be due prior to a RAP submission and would demonstrate that the party was diligently pursuing response activities before all the necessary information was available to submit the RAP.

Within 45 days of discovery of a release, an Interim Response Report would be due. This report should document all activities undertaken by the owner/operator to meet the requirements of section 14, (i.e. reporting, stop release at source, eliminate threat of fire/explosion, etc.).

Within one year of the discovery of a release, an Investigation Report and a Work Plan for response activities would be due. This submission would document any action taken to date, and lay out a plan for complying with the remaining elements of the response.

## **UNIFORM ENVIRONMENTAL COVENANTS ACT (UECA)**

The work group discussed the pending introduction of the UECA to the Michigan State Senate. The UECA is an effort to resolve tensions between environmental law and property law. The work group generally supports any measure that would improve the effectiveness of restrictive covenants used for protection of the public health and the environment. Concerns were raised that Michigan's causation based liability standard would require the UECA to be tailored here for use since it was developed to broadly fit most states, which apply a strict liability standard.

The UECA provision that creates a central database for all environmental covenants was particularly appealing to the group. The group's recommendation to increase the reliability of environmental covenants would be supported by development of a central database to ensure filing and notice requirements are met.

## **LIABILITY/COMPLIANCE WORK GROUP RECOMMENDATIONS**

The work group initiated discussion of the draft final recommendations. A document circulated prior to the meeting includes 31 proposed recommendations for review. Discussion included the format and background that would be provided for each recommendation. Work group participants have requested that each recommendation contain sufficient background information to ensure proper context and understanding. Staff offered a proposed format. The work group discussed recommendations No. 1 – 14; however, time ran out and the work group will reconvene via conference call to discuss the remaining recommendations.

## **NEXT STEPS**

A conference call will be scheduled to finish revising recommendations.

## **ADJOURN**

The meeting adjourned at 12:45 pm.